

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Improving Public Safety)	
Communications in the)	
800 MHz Band)	WT Docket No. 02-55
)	
Consolidating the 900 MHz)	
Industrial/Land Transportation)	
and Business Pool Channels)	
)	
Wireless Telecommunications Bureau)	
Seeks Comment on “Consensus Plan”)	DA 02-2202
Filed in the 800 MHz Public Safety)	
Interference Proceeding)	

TO: The Commission

FURTHER COMMENTS OF CONSUMERS ENERGY COMPANY

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EXECUTIVE SUMMARY

Consumers Energy Company urges the Commission not to adopt the Consensus Plan because it will restrict and disrupt the land mobile communications systems of utility and other critical infrastructure licensees. Under this proposal, utilities will generally be precluded from using cellular system architecture even though this architecture permits licensees to use the spectrum more efficiently and effectively. Furthermore, the restriction is unnecessary because the record demonstrates that it is Nextel's aggressive build out of its system, and not cellular system architecture *per se*, which is responsible for Nextel's interference with Public Safety operations. If this proposal were adopted, it would violate the Commission's long-standing policy of promoting flexibility, innovation and new technologies.

The Consensus Plan is also likely to disrupt utility operations because utility licensees can be required to relocate to, or remain in, a "Guard band," where they will be subject to interference. The proponents of the Consensus Plan even advise that only "communications systems that can best tolerate some interference" should utilize the Guard band. The Commission should focus on resolving the interference problems instead of subjecting one set of licensees to interference instead of another. It is particularly inappropriate for utilities to operate in the Guard band because their communication systems are used to ensure that electricity, water and gas are provided to the public in a safe and efficient manner.

The Consensus Plan also fails to address spectrum use in the Canadian border region. This is a critical failure of the Consensus Plan because reallocating frequencies in the border region is much more complicated than in the rest of the United States. Therefore, the Consensus Plan should not be adopted unless and until it includes a detailed proposal for spectrum use in the border regions.

In addition, if the Commission implements the Consensus Plan, the results would be disastrous. Under the Consensus Plan, the parties that are responsible for coordinating the licensees' relocation, Nextel, the Land Mobile Communications Council and the Regional Planning Committees, are biased and have conflicts of interest. Each has its own interests that would preclude it from implementing a neutral process. If rebanding is to occur, the Commission should develop and coordinate the relocation process.

The Consensus Plan also fails to provide a predictable and specific relocation process. There are no apparent restrictions on the terms that could be imposed on critical infrastructure licensees that are required to relocate. The Commission should establish regulations so critical infrastructure licensees do not have their communications systems compromised. To achieve this objective, the entire relocation process must be: (1) fully coordinated in advance so licensees can be certain of their ability to integrate the new frequencies into their operations; and (2) provide the same rights to critical infrastructure licensees as the Consensus Plan would provide to Public Safety licensees such as approving specific relocation plans to ensure continuous operation, equivalent functionality, coverage and reliability.

Another problem with the Consensus Plan is that Nextel's "promise" to pay \$500 million to relocate Public Safety licensees is contingent upon such a variety of limiting conditions that Nextel is almost certain to pay less than the \$500 million it has promised. Even if Nextel's promise of \$500 million were guaranteed, Nextel concedes that this amount is insufficient to cover the costs of relocating all Public Safety licensees. As a result, the relocation process could be halted midstream.

Even if the Consensus Plan had some merit, the proposal should be tabled because the record in this proceeding does not support the wholesale changes that are proposed. Specifically, the scope of the interference problem has not been established and it is uncertain whether the Consensus Plan would actually eliminate interference to Public Safety operations. No one has presented conclusive evidence that realigning the 800 MHz band will be an effective solution. Even the "technical study" submitted by Nextel did not provide any additional guidance on this issue because it is significantly flawed.

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FURTHER COMMENTS OF CONSUMERS ENERGY COMPANY

Consumers Energy Company (“Consumers”), by and through its undersigned counsel, hereby files these further comments in the above-referenced docket in response to Public Notice DA 02-2202 in which the Federal Communications Commission’s (hereinafter “FCC’s” or “Commission’s”) Wireless Telecommunications Bureau sought comment on the so-called “Consensus Plan.”¹ As it has stated throughout this proceeding, Consumers recognizes the

¹ *Wireless Telecommunications Bureau Seeks Comment On “Consensus Plan” Filed In The 800 MHz Public Safety Interference Proceeding*, DA 02-2202, *Public Notice* (September 6, 2002). Although the Commission expanded the scope of this Public Notice to invite comments on any other rebanding plans or proposals raised in the reply comments, the present comments are, of necessity, limited to addressing the Consensus Plan because the deadline for filing comments

importance of resolving interference to Public Safety operations in the 800 MHz band.

Consumers believes, however, that the Consensus Plan is not the appropriate solution to resolve this problem because: (1) the Consensus Plan would unjustifiably restrict critical infrastructure and other operations in the 800 MHz band; (2) the Consensus Plan fails to address spectrum use in the border regions; (3) the Consensus Plan is unworkable, flawed and not in the public interest; and (4) the evidence before the Commission does not support the proposition that the Consensus Plan will resolve the interference problems.² These serious shortcomings outweigh any reduction in interference to Public Safety licensees that might occur if the Consensus Plan was implemented.

I. THE CONSENSUS PLAN WOULD UNJUSTIFIABLY RESTRICT CRITICAL INFRASTRUCTURE AND OTHER OPERATIONS IN THE 800 MHZ BAND

The Consensus Plan places a number of unjustified restrictions on licensees that operate in the 851-861 MHz band. Under the plan, these licensees are generally precluded from using

responsive to all the reply comments was not extended. *Wireless Telecommunications Bureau Clarifies Scope Of Comments Sought In 800 MHz Public Safety Proceeding (WT Docket No. 02-55)*, DA 02-2306, *Public Notice* (September 17, 2002). The Commission should issue a Further Notice of Proposed Rulemaking to give parties adequate time to address these issues.

² Although the proposal is called the “Consensus Plan” by its proponents, as discussed in Section IV(C), there is significant opposition to the plan. Counsel for Consumers previously communicated its concerns to the principal sponsors of the Consensus Plan prior to the Consensus Plan’s submission. Consumers would welcome the adoption of a plan that could be built on true consensus among all industry sectors that use the 800 MHz band. For the reasons explained in these comments, however, Consumers has been unable to endorse this so-called “Consensus Plan.” For consistency and simplicity only, Consumers will also refer to this proposal as the Consensus Plan.

cellular system architecture.³ In addition, during the relocation process, licensees can be forcibly assigned spectrum in the Guard Band where their operations could be subject to harmful interference. These licensees are also precluded from licensing spectrum that is vacated by Nextel for five years. As a result of these restrictions, licensees will not be able to use the spectrum effectively.

A. The Plan Would Generally Prohibit Licensees From Using Advanced Technologies

The Consensus Plan proposes to restrict cellular system architecture because it claims that these operations have caused Public Safety's interference problems. A close examination of the record, however, reveals that *Nextel's* aggressive build out of its system architecture, and not a "cellular system architecture," *per se* is responsible for interference with Public Safety operations. This restriction is unwarranted and inconsistent with the Commission's policy of promoting the use of advanced, spectrum efficient technologies.

³ The Consensus Plan uses the definition of "cellular system architecture" used by the Commission in connection with the 700 MHz Guard Band proceeding, which includes systems that have (1) more than five overlapping, interactive sites featuring hand-off capability; (2) antenna heights of less than 100 feet on HAAT of less than 500 feet; and (3) more than 20 paired frequencies at each site. Reply Comments of Aeronautical Radio, Inc., the American Mobile Telecommunications Association, the American Petroleum Institute, the Association of American Railroads, the Association of Public Safety Communications Officials – International, Forest Industries Telecommunications, the Industrial Telecommunications Association, Inc., the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriffs Association, the National Sheriffs Association, Nextel Communications, Inc., the Personal Communications Industry Association, and the Taxicab, Limousine and Paratransit Association, WT Docket No. 02-55 at 10 (August 7, 2002) ("*Consensus Plan*").

1. The Restriction On Cellularized Operations Is Unnecessary

Although the Consensus Plan proposes to ban cellular system architecture in the 851-861 MHz band, no proof has been offered that the restriction is necessary. As discussed in Section IV below, only a limited amount of anecdotal evidence has been presented that cellular “like” operations interfere with Public Safety operations. Furthermore, not all cellular system architecture creates the same level of interference.

Rather, the evidence in this proceeding shows a clear pattern that “Nextel is the primary source of interference to public safety systems.”⁴ Nextel’s communications are far more disruptive than other cellular system architectures and constitute the primary cause of interference because: (1) all of Nextel’s channels fall within the passband of the public safety handset; (2) Nextel’s base stations transmit voice channels at 100 percent power regardless of whether the channels are being used by subscribers; and (3) Nextel does not use dynamic power control, which would reduce the average power per base channel.⁵ Other licensees are able to operate their cellular system architecture without interfering with Public Safety operations. As Skitronics notes, “Southern Linc uses equipment substantially the same . . . as that used by Nextel without creating the problems that Nextel creates.”⁶

Consumers is concerned that this prohibition would restrict its ability to use advanced digital systems that use a “cellular system architecture.” By implementing a system that uses a

⁴ Reply Comments of Cingular Wireless LLC and Alltel Communications, Inc., WT Docket No. 02-55 at 8 (August 7, 2002).

⁵ Comments of AT&T Wireless Services, Inc., WT Docket No. 02-55 at 6 (May 6, 2002).

⁶ Comments of Skitronics, LLC, WT Docket No. 02-55 at 21 (May 6, 2002).

cellular system architecture, Consumers would be able to use its frequencies more efficiently and increase its communications throughput. It would also allow Consumers's field workers to better communicate from inside a building.⁷

Similarly, Public Safety licensees, which would also be precluded from using "cellular system architecture," would be hindered by this restriction. As the City of San Diego notes, "there are site-by-site cases where public safety must put in place cellular-like architecture."⁸ Accordingly, if the Commission decides to remove Nextel from the spectrum below 861 MHz, it should not impose technical restrictions on the licensees remaining there.

2. The Commission Has Established A Policy Of Promoting Flexibility, Innovation And New Technologies

One of the guiding principles that the Commission established for its spectrum management activities is to "pursue policies that . . . encourage the development of emerging telecommunications technologies."⁹ This policy was established because the demand for spectrum has increased dramatically as a result of the explosive growth of wireless

⁷ Land mobile communications systems that utilize a cellular system architecture are generally better able to communicate to field workers in a building because the antennas for these systems are close to the ground.

⁸ Reply Comments of the City of San Diego, WT Docket No. 02-55 at 4 (August 7, 2002). In a recent report by McKinsey & Co. for the New York City Fire Department, it was concluded that Fire Department personnel could communicate reliably in "just a fraction" of the approximately 2,000 high-rise buildings in New York City due to a lack of in-building coverage. *Increasing FDNY's Preparedness*, McKinsey & Co. at 90, (August 19, 2002), available at http://www.nyc.gov/html/fdny/html/mck_report/toc.html (last viewed September 23, 2002).

⁹ *In the Matter of Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium*, FCC 99-354, *Policy Statement*, 14 FCC Rcd 19868, 19868 ¶ 2 (1999).

communications.¹⁰ The Commission recognizes that it is necessary to use the spectrum more efficiently because there is a limited amount available. In addition, establishing policies that allow innovation is important to spectrum users because they “need flexibility to respond to market forces and demands.”¹¹ Recently, the Commission reaffirmed this policy and established the Spectrum Policy Task Force to “establish new ways to support innovation and the efficient, flexible use of spectrum.”¹²

The Consensus Plan would violate this long-standing policy by generally prohibiting cellular operations in the 851-861 MHz band. Licensees would be precluded from implementing many network architectures and advanced technologies that utilize the spectrum more efficiently. Consumers agrees with the United Telecom Council, that this policy would “would hamper unnecessarily the growth of advanced technology and discriminate against existing systems.”¹³ Instead of promoting innovation, this proposal would restrict it. As Commissioner Powell stated, if the Commission does not foster innovation, “we could freeze ourselves in time to the detriment of the market, the technology and our citizens.”¹⁴

¹⁰ *Id.*

¹¹ *In the Matter of Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, FCC 00-401, *Policy Statement*, 15 FCC Rcd 24178, 24181 (2000).

¹² *FCC Chairman Michael K. Powell Announces Formation of Spectrum Policy Task Force*, News Release, (June 6, 2002).

¹³ Reply Comments of United Telecom Council, WT Docket No. 02-55 at 15 (August 7, 2002) (*UTC Reply Comments*).

¹⁴ *FCC Chairman Michael K. Powell Outlines Critical Elements Of Future Spectrum Policy*, News Release, (August 9, 2002).

B. Operations In The Guard Band May Be Subject To Harmful Interference

Another problem with the Consensus Plan is that licensees can be required to relocate to, or remain in, the Guard band, where they will be subject to interference. The Consensus Plan would establish a Guard band (859-861 MHz band) between Public Safety operations (851-859 MHz band) and cellularized operations (861-869 MHz band) to protect Public Safety systems from interference that the proponents claim will be caused by cellularized operations.¹⁵ The proponents of the plan recognize that operations in the Guard band will be subject to interference and recommend that critical Public Safety communications should be relocated out of the Guard band.¹⁶ They advise that only “communications systems that can best tolerate some interference” should utilize the Guard band.¹⁷

Despite this strong warning, the Consensus Plan actually requires some Business and I/LT licensees *to relocate into, or remain in*, the Guard band. Incredibly, instead of resolving the interference problem, the Consensus Plan’s “solution” is to subject other licensees to interference. It is not appropriate to devise a solution that subjects one set of licensees to interference instead of another. Instead, the Commission should focus on stopping the causes of interference. As Ameren notes, it is inappropriate to have utilities operate in the Guard band because their communications systems are “used to protect people and property in all conditions

¹⁵ *Consensus Plan* at 9.

¹⁶ *Consensus Plan* at 12.

¹⁷ Reply Comments of Nextel Communications, Inc., WT Docket No. 02-55 at Appendix II p. 4 (August 7, 2002) (“*Nextel Reply Comments*”).

and at all times.”¹⁸ Consumers’s land mobile communications could be compromised if the Consensus Plan is adopted because a number of its frequencies are already licensed in, or could be relocated to, the Guard band. In addition to protecting Public Safety communications, there is also a critical need to protect utility communications.

C. Critical Infrastructure Licensees Should Not Be Prohibited For Five Years From Licensing Additional Spectrum Vacated By Nextel

Another reason that the spectrum will not be used effectively is that under this plan all the spectrum that will be vacated by Nextel is reserved for Public Safety licensees until five years after all the NPSPAC licensees in a given Region are relocated.¹⁹ Depending on the length of time that it takes to relocate the NPSPAC licensees, utilities and other critical infrastructure licensees could be precluded from licensing additional spectrum for fifteen years or more.²⁰ Even if the relocation process could be completed in as little as three years, as claimed by Nextel, additional frequencies would be unavailable for eight years. Not until the “waiting period” is over will Business, I/LT and SMR licensees finally be permitted to license the spectrum.

Utilities need to be able to license additional frequencies as the population grows and as population centers move away from central cities. This will allow utilities to continue to use their communications system for emergency use and to monitor day-to-day activities throughout

¹⁸ Reply Comments of Ameren Corporation, WT Docket No. 02-55 at 12 (August 7, 2002) (“*Ameren Reply Comments*”).

¹⁹ *Consensus Plan* at 15-16.

²⁰ As discussed in Section III(C)(5), the record indicates that it will take a minimum of twelve years to complete the Consensus Plan.

their entire service area. If utilities cannot use their communications systems in newly developed areas, then it is more likely that there will be power outages in those areas and that repair times will also increase. The critical nature of a utility's operations mandates that sufficient channels be available for their communications systems to expand as the population grows and as population centers move. There is a limited amount of spectrum and the Commission should not institute regulations that ensure that it will be used inefficiently.

II. THE CONSENSUS PLAN FAILS TO ADDRESS FREQUENCY USE IN THE CANADIAN BORDER REGION

Despite the clear request from the Commission that any proposed plan should address spectrum use in the border regions, the proponents of the Consensus Plan have simply failed to develop a border region plan.²¹ The Consensus Plan should not be adopted unless and until it includes a detailed proposal for spectrum use in the border regions on which interested parties have had an opportunity to comment.

A. The Commission Should Not Adopt A Realignment Plan Unless Or Until It Has A Well-Defined Plan For Spectrum Use In The Border Region

Reallocating frequencies in the border region is much more complicated than in the rest of the United States because frequency use near Canada is governed by bilateral coordination agreements between the United States and Canada. As a result, a proposal to reallocate spectrum

²¹ *In the Matter of Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, 17 FCC Rcd 4873, 4892 ¶ 33 (2002) (“*NPRM*”).

throughout the United States could have a dramatically different effect in the border regions than in the remainder of the country.

For example, there are currently 170 frequency pairs allocated for Business and I/LT licensees in Region 3. If the Consensus Plan were applied generally to the border regions, Business and I/LT licensees would be allocated only 90 channels in Region 3. If this were to occur, it would compromise Consumers's ability to conduct its utility operations in the region because it is doubtful that, under these conditions, Consumers would be able to license a sufficient amount of spectrum for its land mobile communications system. The Commission should not adopt a realignment plan unless it has a well-defined plan for spectrum use in the border regions. Otherwise, the unintended consequences could restrict the ability of many licensees to use the spectrum.

B. Affected Parties Must Have A Further Opportunity To Comment On Any Proposed Plan For The Border Region

The proponents of the Consensus Plan stated that they intend to provide the Commission with a detailed spectrum realignment plan for the border regions. Given the complicated nature of allocating spectrum in the border regions, it is likely that any proposal will give rise to numerous issues and a variety of viewpoints. Given the extraordinary effect that this realignment plan will have on licensees, the Commission should take all necessary steps to ensure that interested parties have an opportunity to comment on any proposal to allocate spectrum in the border regions.

III. THE CONSENSUS PLAN IS UNWORKABLE, FLAWED AND NOT IN THE PUBLIC INTEREST

In designing the Consensus Plan, the drafters instituted a number of steps to ensure that Public Safety licensees would not have their communications systems disrupted. Public Safety licensees are allowed to approve any relocation plan that impacts them to ensure “continuous operation, equivalent functionality, coverage, and reliability.”²² In addition, they are also to be fully reimbursed for their relocation costs. In contrast, utilities and other critical infrastructure licensees are provided with none of these guarantees. They will be required to relocate based on the biased whims of Nextel, the Regional Planning Committees (“RPCs”) and the Land Mobile Communications Council (“LMCC”).

Although the Consensus Plan claims to take into account the interests of all 800 MHz licensees, there are significant flaws in the plan that make it unworkable and not in the public interest. As discussed below, the Consensus Plan has failed to: (1) ensure that the parties implementing the relocation plan are unbiased and neutral; (2) address the unique needs of critical infrastructure licensees so that a predictable relocation process is established under which they will have their relocation costs reimbursed; (3) guarantee complete funding for Public Safety licensees; and (4) provide sufficient spectrum from Nextel to implement the Consensus Plan.

²² *Consensus Plan* at 15.

A. The Parties Coordinating The Relocation Of The Licensees Are Biased And Have A Conflict Of Interest

As the Consensus Plan notes, implementation “will require coordination among the affected parties.”²³ To coordinate the move, the proponents of the Consensus Plan suggest that Nextel, LMCC and the RPCs, should develop a bandplan. The problem with this proposal is that all three entities are biased and each has its own interests that would preclude it from drafting a neutral plan that would adequately protect Consumers and other critical infrastructure licensees.

For a number of years Nextel has unsuccessfully tried to convince utilities that they should take service from Nextel instead of relying on their own land mobile communications systems. Utilities have consistently refused to switch because commercial wireless providers generally do not provide service that meets the unique needs of utilities.²⁴ By allowing Nextel to coordinate the utilities’ relocation plan, Nextel has every incentive to make the process so difficult and complex that utilities would be more likely to switch to Nextel’s commercial service than relocate their own system.

In addition, Nextel’s competitors would also be relocated under the Consensus Plan. A difficult relocation process would also make it more likely that Nextel’s competitors would be forced out of business or that Nextel would be able to steal their customers. The Commission should not allow Nextel to coordinate the relocation process because it has a vested interest in making the process as burdensome and costly as possible.

²³ *Id.* at 17.

²⁴ Utilities generally rely on their own private internal communications systems because other commercial systems may not be: (1) as reliable and dependable; (2) cover their entire service area; (3) provide priority access; and (4) offer group dispatch.

LMCC also has a conflict of interest and should not be authorized to coordinate the relocation process. As an “association of associations” that is largely controlled by the frequency coordinators, LMCC has a vested interest in maximizing coordination “churn.” With the near saturation of the 800 MHz band, ITA, PCIA, and APCO would undoubtedly welcome the opportunity to re-coordinate all the systems that would have to relocate under their plan.

The RPCs also have a biased viewpoint because they manage the NPSPAC channels. As a result, they are concerned with protecting the interests of licensees that use the NPSPAC channels, and typically do not have the resources to manage the relocation of non-Public Safety licensees. All three entities that the Consensus Plan proposed to coordinate the relocation process are biased and have a conflict-of-interest. Therefore, Consumers strongly recommends that the Commission develop and coordinate the relocation plan to ensure that the rights of all parties are protected.

B. The Consensus Plan Fails To Account For The Interests Of Critical Infrastructure Licensees

If the Commission requires critical infrastructure licensees to relocate, it must implement a process to ensure that they may operate their communications systems continuously during the process. Virtually every aspect of modern life depends on the delivery of electricity and society can ill-afford to have this compromised. As the Commission noted, “it would not appear advisable to require a station associated with the restoration of electrical power service to precipitously discontinue service.”²⁵ Like Public Safety communications, utility

²⁵ *NPRM* at 4893, ¶ 34.

communications are needed to serve and protect the public.²⁶ Therefore, critical infrastructure licensees should be provided with the same rights as Public Safety licensees, including the right to approve any relocation plan and to be reimbursed for their relocation expenses.

1. The Consensus Plans Fails To Provide A Predictable And Specific Relocation Process

As discussed above, under the Consensus Plan Nextel, LMCC and the RPCs would be given the right to implement a band plan for the relocation process. None of these parties' interests are aligned with those of utilities and other Business and I/LT licensees and such licensees would therefore have no voice in this process and virtually no rights or protections at all.²⁷ Furthermore, there are no apparent restrictions on the terms these entities could impose. Nextel believes that the Consensus Plan could be implemented in three to four years.²⁸ To accomplish this, utilities might be given only six months to relocate. This would be an unrealistic timetable. The relocation process is extraordinarily complicated because many utilities, such as Consumers, operate wide-area systems that use numerous overlapping frequencies throughout their service area. As a result, just developing a frequency plan that

²⁶ Congress recently confirmed that energy and water utilities are part of the nation's critical infrastructure, and that it shall be the policy of the United States "that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States." *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, Sec. 1016, 115 Stat. 400 (2001).

²⁷ Two of the principal sponsors of the Consensus Plan, ITA and PCIA, are also members of LMCC. It is apparent from their endorsement of the Consensus Plan, however, that they do not view I/LT licensees, or utilities specifically, as deserving of protection.

²⁸ *Nextel Reply Comments* at 29,

protects against co-channel interference could take months to develop. Depending on how many base stations are relocated and how many mobile units must be retuned or replaced, it could take years to relocate. For Consumers, the process will be particularly difficult because it has a limited window each year during seasonal radio system traffic lulls to make radio system changes. The Commission should establish regulations so critical infrastructure licensees do not have their communications systems compromised.

To achieve this objective, the entire relocation process must be fully coordinated in advance so that licensees can be certain of their ability to integrate the relocations into their operations. Without prior knowledge of the entire relocation process, utilities could be required to make constant adjustments to their communications systems, which would dramatically increase the probability of a service disruption. This is particularly important for utilities so that they can plan for, and anticipate any problems that could occur.

Additionally, the Commission should adopt regulations so licensees are guaranteed that they will be relocated only once. This will greatly simplify the process because licensees will have to reprogram their mobile units once. This is particularly important for utilities and other licensees that operate large wide-area systems because thousands of mobile units are used with these systems. It is extremely expensive and complicated to reprogram the mobile units while still operating the communications system.

2. Business And I/LT Licensees Should Be Reimbursed For Their Relocation Expenses

Under the Consensus Plan, Business, I/LT and SMR licensees are forced to relocate but would not be reimbursed for the costs they incur even though they are not the cause of the

interference. It is inequitable and unjust to require licensees that are not causing interference to pay their own relocation costs. Consumers agrees with the National Association of Manufacturers and MRFAC that the Commission “needs to fashion an equitable alternative that . . . does not place the burden of fixing the problem on innocent parties.”²⁹

Instead, the Commission should focus on the party that is causing the interference. There is significant agreement among the commenting parties that any “solution should mandate that interference causer(s) should bear the costs of relocation or retuning.”³⁰ Furthermore, the Commission’s recent precedent requires displaced incumbent licensees to be compensated.³¹

C. Nextel’s Funding Is Contingent Upon Such A Variety Of Limiting Conditions That Nextel Is Certain To Avoid Responsibility For The Interference It Is Causing

Although Nextel pledged to contribute \$500 million towards Public Safety relocation costs, the funding is contingent on a variety of conditions. As a result, the Consensus Plan presents a serious risk that the Public Safety licensees will not receive sufficient funds to cover their relocation costs and that the relocation process will not be completed.

²⁹ Reply Comments of National Association of Manufacturers and MRFAC, Inc., WT Docket No. 02-55 at 6 (August 7, 2002).

³⁰ See e.g. Reply Comments of Boeing Company, WT Docket No. 02-55 at 2 (August 7, 2002).

³¹ *Ameren Reply Comments* at 9 citing *In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886, 6890 (1992). *In the Matter of Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463, 1510 (1995). *In the Matter of Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, *Memorandum Opinion and Order and Third Notice of Proposed Rulemaking and Order*, 13 FCC Rcd 23949, 23955 (1998).

1. Funding Is Contingent On The Consensus Plan Being Adopted Without Modification

Nextel's \$500 million pledge to relocate Public Safety licensees is wholly contingent upon the Commission's adoption of the Consensus Plan as proposed.³² The Commission is not permitted to modify the plan, even though certain aspects of the plan are intended to benefit only Nextel and will result in the inefficient use of spectrum. For example, under this plan Nextel will return its 700 MHz Guard band spectrum so that it may be redesignated for Public Safety use.³³ This spectrum, however, is of limited use to Public Safety licensees because it is subject to more interference than the Public Safety spectrum in the remainder of the 700 MHz band.³⁴ It appears the real reason Nextel wants to "donate" this spectrum is that it will allow Nextel to state that it would lose approximately 10.5 MHz of spectrum under the Consensus Plan. As a result of "losing" 10.5 MHz of spectrum, Nextel can claim that the Commission should allocate it 10 MHz of spectrum in the 1.9 GHz band. The Commission should not base a decision to adopt a relocation plan on illusory premises such as this one.

2. Nextel's \$500 Million Contribution Could Be Fully Refunded Within Two Years Of The Consensus Plan's Adoption

Even if the Consensus Plan is adopted as proposed, it is doubtful that Nextel would actually contribute the full \$500 million due to several additional strings Nextel has attached. Nextel's contribution would revert to Nextel if within two years from the adoption of the

³² *Nextel Reply Comments* at 31.

³³ *Consensus Plan* at 19.

Consensus Plan, the Commission has not: (1) resolved all appeals and challenges to the Consensus Plan; (2) established an independent fund administrator; (3) established guidelines to identify eligible retuning expenditures for Public Safety licensees; and (4) established procedures for making and verifying claims for cost reimbursements (collectively “the Four Conditions”). Given the novel and complex legal issues surrounding this proposal (*e.g.* whether the Commission is legally permitted to “swap” spectrum with Nextel), it is likely that, if adopted, the Consensus Plan will be challenged. Considering that parties can request that the Commission reconsider its decision, then appeal to the U.S Court of Appeals and perhaps the Supreme Court, it is unlikely that this proceeding would be conclusively resolved in two years.

3. Four Years Into The Relocation Process, Nextel Is Relieved Of Its Obligation To Contribute Additional Funds To Relocate Public Safety Licensees

Even if all of the above conditions are met within two years, Nextel could still avoid fulfilling its promise. Nextel proposed a funding distribution mechanism under the Consensus Plan whereby it would contribute \$50 million to a fund to reimburse Public Safety licensees for their relocation costs (“Relocation Fund”).³⁵ Nextel would also establish a separate escrow account for the remaining \$450 million.³⁶ Only when the Four Conditions are met would Nextel contribute an additional \$50 million dollars to the Relocation Fund. As funds are dispersed to

³⁴ *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476, 516-520 ¶ 98-107 (2000).

³⁵ The fund administrator is precluded from disbursing the funds until the Four Conditions are met. If the conditions are not met the money will be returned to Nextel. *Nextel Reply Comments* at 31-32.

³⁶ *Id.* at 31.

Public Safety licensees, Nextel will transfer \$50 million at a time to the Relocation Fund from its escrow account whenever the Relocation Fund balance is less than \$50 million. Nextel, however, is not required to transfer *any* additional moneys to the Relocation Fund four years after its second \$50 million transfer.³⁷ This would occur approximately four years after the Four Conditions are met. Furthermore, two years after Nextel's last \$50 million transfer, any money that remains in the Relocation Fund would be returned to Nextel.³⁸ As a result of these conditions, Nextel's contribution could be as little as \$100 million and, depending on how quickly the funds are dispersed, a significant portion of that money could even be returned to Nextel. As discussed below, it is unlikely that the relocation process will be completed within six years and Nextel would likely have some of the money refunded.

4. Nextel's Funds Will Not Be Sufficient To Fully Reimburse Public Safety Licensees And The Relocation Process Could Be Halted Midstream

Even if Nextel's contribution of \$500 million were guaranteed, it would not cover the costs of relocating all Public Safety licensees. Nextel concedes that its contribution would cover only a "portion of public safety operators' relocation costs" and additional contributions from the private and public sector are necessary.³⁹ To rectify the shortfall, the Consensus Plan encourages "both public safety and Nextel to continue to seek additional funding."⁴⁰ If adopted, Public Safety licensees will be forced to seek additional funds from Congress. There are no assurances,

³⁷ *Id.* at 32.

³⁸ *Id.* at 32.

³⁹ *Id.* at 30.

⁴⁰ *Consensus Plan* at 20.

however, that Congress will provide the necessary funds. As a result of the limited funding, it is quite possible that the Consensus Plan could be stopped before all Public Safety licensees are relocated. If this were to occur, it would be an unmitigated disaster because the overall range of frequencies that Nextel would occupy would increase and therefore increase the likelihood that Public Safety licensees would be subject to interference.

5. Nextel's Requirement To Fund Public Safety's Relocation Costs Will Expire Before The Relocation Process Is Complete

Because of the length of time that the relocation process will take, Nextel will not be required to pay the relocation costs. Nextel's requirement to fund the relocation of Public Safety licensees expires, at the latest, six years into the process.⁴¹ The record, however, indicates that it will take a minimum of 12 years because a number of different steps must be taken to complete the Consensus Plan.

1. Nextel must vacate channels in the 854-859 MHz band to permit Public Safety licensees operating in the 851-854 and 859-861 MHz bands to relocate to the 854-859 MHz band.
2. Public Safety licensees operating in the 851-854 and 859-861 MHz bands will be relocated to the 854-859 MHz band.
3. Site-based Business, I/LT and SMR licensees operating in the 851-854 MHz band will relocate to the Guard Band (859-861 MHz bands).⁴²
4. EA licensees in the 851-854 MHz band will be relocated to the 854-859 MHz band.

⁴¹ The relocation process will not begin until the Four Conditions are met. Once these conditions are met, Nextel is only required to contribute to the Relocation Fund for 4 years. Two years after Nextel's last contribution, any remaining money can be returned to Nextel. Thus, Nextel's "promise" to relocate Public Safety licensees will expire in six years, if not sooner.

⁴² If there is not enough spectrum in the Guard Band for all the relocated licensees, Nextel will provide additional spectrum in the 854-859 MHz band.

5. NPSPAC licensees will relocate from the 866-869 MHz band to the 851-854 MHz band.
6. After the NPSPAC channels are relocated, Nextel will relinquish its licenses in the 854-861 MHz band and relocate to the 861-869 MHz band.

With the exception of steps three and four, each step must be completed before the next one can begin. As a result, there are four separate times in which licensees will be relocating within the 800 MHz band. The City of Philadelphia and Fort Lauderdale both estimate that it will take three to five years to relocate within the 800 MHz band.”⁴³ Because it requires licensees to relocate in four separate stages, realigning the 800 MHz band could continue well into the next decade.

Although licensees might be relocating for over a decade, six years into the process, if not earlier, Nextel’s funding obligation will expire. At that time, Nextel is entitled to have any remaining funds returned to it. Because the NPSPAC licensees would be relocated third in the process, it is doubtful that they will be relocated in time to have their relocation expenses reimbursed.

D. Nextel Does Not Have Sufficient Spectrum Holdings To “Swap” Spectrum

In its comments, Nextel claims that it has a running average of 18 MHz of spectrum in the 800 MHz band.⁴⁴ This spectrum would be used to relocate Public Safety licensees and relinquished after the Consensus Plan is implemented. Nextel, however, has included spectrum

⁴³ Comments of City of Public Safety Improvement Coalition Comments, WT Docket No. 02-55 at 6 (May 6, 2002); Comments of City of Fort Lauderdale, WT Docket No. 02-55 at 8 (May 6, 2002).

⁴⁴ Comments of Nextel Communications, Inc., WT Docket No. 02-55 at 2 (May 6, 2002).

held by Nextel Partners in calculating its spectrum holdings even though it does not have the authority to “swap” this spectrum.⁴⁵ Before adopting the Consensus Plan, the Commission must ensure that Nextel, Nextel Partners and any other entities that are providing spectrum under the Consensus Plan, are willing and legally bound to relinquish their spectrum if this plan is adopted.

It is also unclear exactly what spectrum Nextel would relinquish if the Consensus Plan were adopted. To determine this, the Commission should require Nextel to provide the Commission with a list of licenses that it would give up under this plan. This would allow other parties to investigate whether the spectrum claims made by Nextel are accurate. In addition, Nextel should be prohibited from assigning, exchanging, canceling or deleting any licenses or frequencies, other than in connection with a frequency swap needed to effectuate the realignment plan. Any channels not needed to relocate incumbent systems should revert to the Commission.

IV. THE EVIDENCE IN THE RECORD DOES NOT SUPPORT THE DRAMATIC RELOCATION CALLED FOR BY THE CONSENSUS PLAN

As discussed above, the Consensus Plan should not be adopted because it is a severely flawed proposal that would unjustifiably restrict critical infrastructure licensees. Even if the Consensus Plan had some merit, the proposal should be tabled because the record in this proceeding does not support the wholesale changes that are proposed. Specifically, the scope of the interference problem has not been established and it is uncertain whether the Consensus Plan would actually resolve the interference problems.

⁴⁵ *Id.* at 2 n. 4.

A. The Extent Of The Interference Problem Has Not Been Determined

The full scope of the interference problem is unknown. As the City of Baltimore notes, “it is clear, indeed obvious, from the record that there are substantial questions of fact concerning the extent of the public safety interference problem.”⁴⁶ A number of commentors have repeatedly stated that further investigation is needed in order to determine the extent of the interference problems.⁴⁷

Even proponents of the Consensus Plan previously recognized that great uncertainty surrounds the interference problem. In its comments, the American Petroleum Institute recommended that the Commission “develop and analyze adequate technical information before embarking on a path towards band reconfiguration.”⁴⁸ The American Mobile Telecommunications Association urged the Commission to “first focus its attention and its considerable technical expertise on identifying more precisely the interference causes.”⁴⁹

Despite the ongoing question as to the extent of the interference problem, the Consensus Plan does not present any additional evidence to justify a proposal that would impose great burdens on all licensees in the 800 MHz band. The proponents merely cited a few instances

⁴⁶ Reply Comments of the City of Baltimore, Maryland, WT Docket No. 02-55 at 3 (August 7, 2002).

⁴⁷ See e.g. Reply Comments of National Rural Electric Cooperative Association, WT Docket No. 02-55 at 4 (August 7, 2002).

⁴⁸ Comments of American Petroleum Institute, WT Docket No. 02-55 at 3 (May 6, 2002) (“*API Comments*”).

⁴⁹ Comments of American Mobile Telecommunications Association, Inc., WT Docket No. 02-55 at 7 (May 1, 2002).

where interference has occurred.⁵⁰ Significantly, the Association of Public-Safety Communications Officials - International, Inc., which has been documenting instances of interference for over two years, even now has reported approximately 107 instances of interference.⁵¹ Indeed, the entire record of Public Safety interference is based on limited anecdotal evidence. The evidence presented so far indicates only that under certain enumerated circumstances Public Safety licensees can be subject to localized interference. No one has presented compelling evidence of a broadbased problem to justify the massive nationwide relocation that is proposed. Adopting the Consensus Plan would therefore essentially constitute a rush to judgment in this matter that would greatly advance the interests of Nextel while only marginally, if at all, benefiting Public Safety licensees.

B. Proponents Of The Consensus Plan Have Not Demonstrated That Their Proposal Will Resolve The Interference Problems

Under the Consensus Plan, the 800 MHz band would be realigned into essentially two blocks of spectrum; one designated for non-cellular operations (high-site, high power) at 851-861 MHz, including a guard band, located at 859-861 MHz, and one for cellular-like operations (low-site, low power) at 861-869 MHz. Public Safety licensees, including those on the NPSPAC channels, would relocate to the 851-859 MHz band. Although the Consensus Plan calls for the 800 MHz band to be realigned, the proponents of the plan have not shown that this would actually eliminate interference to Public Safety licensees.

⁵⁰ *Consensus Plan* at 2-3.

⁵¹ The list of instances documented by APCO is available at: http://www.apcointl.org/frequency/project_39/downloads/combined.txt (last viewed September 23, 2002).

As discussed in greater detail below, the record in this proceeding still has not demonstrated that realigning the 800 MHz band will actually resolve the interference problems. No one has presented conclusive evidence that realigning the 800 MHz band will be an effective solution. Even the “technical study” submitted by Nextel did not provide any additional guidance on this issue because it is significantly flawed. Until this uncertainty is resolved, the Commission should refrain from taking drastic action.

1. Commentors Have Raised Significant Questions As To Whether Rebanding Within The 800 MHz Band Would Resolve The Interference Problems

As discussed above, the Consensus Plan proposes to eliminate interference to Public Safety licensees by realigning the 800 MHz band. Under this proposal, however, both Nextel and Public Safety licensees would both remain in the 800 MHz band. As Consumers noted in its reply comments, a realignment plan that allows both Public Safety licensees and Nextel to remain in the 800 MHz band may not resolve the interference problems.⁵² The record in this proceeding is clear that “receiver overload and intermodulation will continue” by realigning the 800 MHz band in this manner.⁵³ Consumers agrees with East Bay Municipal Utility District that rebanding is “highly disruptive and not justified on the record.”⁵⁴

⁵² Reply Comments of Consumers Energy Company, WT Docket No. 02-55 at 18-20 (August 7, 2002) (“*Consumers Reply Comments*”).

⁵³ Reply Comments of Alltel Communications, Inc., AT&T Wireless Services, Inc., Cingular Wireless LLC, Coupe Communications, Inc., First Cellular, Nokia Inc., Southern Linc, United States Cellular Corporation, WT Docket No. 02-55 at 12 (August 7, 2002).

⁵⁴ Reply Comments of East Bay Municipal Utility District, WT Docket No. 02-55 at 6 (June 5, 2002).

Significantly, the proponents of the Consensus Plan also recognize that rebanding by itself will not resolve the interference problems. They state that in addition to realigning the 800 MHz band, it is necessary for the Commission to codify and possibly revise the *Best Practices Guide* so that the rights and obligations of licensees to correct interference are clearly defined.⁵⁵ In addition to realigning the 800 MHz band, the Consensus Plan would also require the Commission to adopt a case-by-case approach that utilizes technical solutions, which is essentially the market-based approach Consumers advocated in its reply comments.⁵⁶

Instead of realigning the 800 MHz band, the market-based approach should be implemented first to resolve the interference problems. This will allow the Commission to determine whether it is actually necessary to realign the 800 MHz band. By taking this approach, it will also give the Commission an opportunity to investigate fully the extent of the interference problem. It is much more logical to implement the market-based solutions first and then determine whether it is necessary to realign the 800 MHz band. Otherwise the Commission will be putting the “cart before the horse.”⁵⁷

2. Nextel’s Technical Analysis Of Why Its Plan Would Resolve Public Safety Interference Is Significantly Flawed

The proponents of the Consensus Plan claim that separating cellularized operations from non-cellular systems will mitigate interference in the 800 MHz band.⁵⁸ To support this

⁵⁵ *Consensus Plan* at 22.

⁵⁶ *See Consumers Reply Comments* at 9-14.

⁵⁷ *See Comments of Verizon Wireless, WT Docket No. 02-55* at 8 (May 6, 2002).

⁵⁸ *Consensus Plan* at 8.

proposition, they rely on a technical study conducted by Nextel.⁵⁹ A closer examination of this study, however, reveals that it is significantly flawed because the study: (1) fails to calculate accurately the amount of interference that Nextel will cause; (2) minimizes the effect of fifth order intermodulation; and (3) only addresses interference to the relocated NPSPAC channels.

Although Nextel claims that interference to the relocated NPSPAC channels will be greatly reduced by the Consensus Plan, it appears that these finding are misleading and inaccurate. In the technical study, Nextel states that “it can be shown mathematically that significant IM products from *Nextel transmitters in the 861-866 MHz range* will not fall below 856 MHz and will not fall above 871 MHz. Therefore, relocating the NPSPAC channel block below 856 MHz *virtually eliminates Nextel-only IM products on the relocated channels.*” (emphasis added)⁶⁰ This analysis is not accurate because under the Consensus Plan Nextel will be licensed throughout the *861-869 MHz band*, not the 861-866 MHz range. As a result, Nextel can build transmitters on any frequency in the 861-869 MHz range and third order intermodulation products, which Nextel concedes can cause significant interference problems, could fall in the 853-877 MHz range. Despite relocating, the “new” NPSPAC channels would *not be fully protected* from Nextel’s third order intermodulation interference.

Another problem with the technical study is that Nextel appears to have discounted the effects of fifth order intermodulation products. Nextel’s technical study states that third order intermodulation “is almost always going to be the only IM issue in play.”⁶¹ As Motorola notes, however, *fifth order* intermodulation products “are the more common form of IM interference

⁵⁹ *Id.* at 21-22.

⁶⁰ *Nextel Reply Comments* at Appendix II p. 3.

received by public safety and industrial systems in the 800 MHz band.”⁶² In determining whether Public Safety licensees will be subject to harmful interference, it is necessary to take into account interference caused by fifth order intermodulation products. Because they minimize the significance of these effects, Nextel’s technical findings are highly suspect.

The technical study is also flawed because it fails to quantify the Consensus Plan’s impact on interference to Public Safety licensees in the 854-859 MHz band. In the report, Nextel merely states that “the probability that a Nextel-only [IM] product will fall on a public safety frequency will be reduced.”⁶³ Public Safety licensees in the 854-859 MHz band, however, will still be subject to interference from Nextel. As discussed above, Nextel’s technical study even concedes that third order intermodulation products, which can cause significant interference problems, could fall in the 854-859 MHz band.⁶⁴ In order to justify realignment of the 800 MHz band, there must be affirmative proof that the solution will significantly improve the interference problems.

C. A Significant Segment Of 800 MHz Licensees Do Not Support The “Consensus Plan”

Although the proponents of the “Consensus Plan” claim to “represent every type of licensee operating in the 800 MHz band,” it is apparent that there is significant, and broadly

⁶¹ *Id.* at Appendix II p. 6.

⁶² Comments of Motorola Inc., WT Docket No. 02-55 at 18 n. 27. (May 6, 2002).

⁶³ *Nextel Reply Comments* at Appendix II p 3. In its comments Nextel merely states that by relocating it could “minimize IM products falling on the interleaved public safety channels in the 854-859 MHz range.” *Id.* at 21.

⁶⁴ *Id.* at Appendix II p. 3.

based, opposition to the plan.⁶⁵ Utilities, SMR licensees, and cellular licensees oppose the consensus plan.⁶⁶ Even some Public Safety licensees oppose the Consensus Plan.⁶⁷ Consumers agrees with Carolina Power and Light Company and TXU Business Services that the Consensus Plan “has not been negotiated with all affected parties” and “does not reflect an industry consensus.”⁶⁸

In addition, it is evident from the comments and reply comments that more parties will oppose the Consensus Plan. A number of commentors, including public safety organizations, have consistently opposed plans that implement any type of in-band realignment plan or fail to fully reimburse licensees that are not causing interference for their relocation, as would occur under the “consensus” plan. As the Public Safety Wireless Network notes, a reorganization of the 800 MHz band is not likely to resolve the interference problems.⁶⁹ The City of Portland concurs that realigning the 800 MHz band “would not resolve the interference problems” it is currently experiencing.⁷⁰

⁶⁵ *Consensus Plan* at 2.

⁶⁶ See e.g. *UTC Reply Comments* at 18; Reply Comments of Pinnacle West Capital Corporation, WT Docket No. 02-55 at 5-6 (August 7, 2002); Reply Comments of Mobile Relay Associates, WT Docket No. 02-55 at 3 (August 7, 2002); Reply Comments of Nevada Wireless, LLC, WT Docket No. 02-55 at 7 (September 19, 2002).

⁶⁷ See e.g. Reply Comments of County of Maui, WT Docket No. 02-55 at 1 (September 20, 2002).

⁶⁸ Reply Comments of Carolina Power and Light Company and TXU Business Services, WT Docket No. 02-55 at 3 (August 7, 2002).

⁶⁹ Reply Comments of Public Safety Wireless Network, WT Docket No. 02-55 at 6 (August 7, 2002).

⁷⁰ Reply Comments of City of Portland, Oregon WT Docket No. 02-55 at 4 (August 7, 2002).

V. CONCLUSION

In conclusion, the Commission should not adopt the Consensus Plan because it will restrict and disrupt the land mobile communications systems of utilities and other critical infrastructure licensees. Instead, the Commission should adopt a proposal that promotes flexibility, innovation and new technologies. In addition, any solution should focus on resolving the interference problems instead of subjecting certain licensees to interference. A plan must also address spectrum use in the border regions and ensure that critical infrastructure licensees do not have their communications systems compromised in the relocation process. Furthermore, the relocation costs of licensees that are not causing interference must be reimbursed. By adopting a plan that incorporates these parameters, the Commission will develop an appropriate solution to resolve the interference problems in the 800 MHz band.

WHEREFORE, THE PREMISES CONSIDERED, Consumers respectfully requests that the Commission consider these comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: September 23, 2002

CERTIFICATE OF SERVICE

I, Christine S. Bisio, do hereby certify that on this 23rd day of September 2002, I caused a copy of the foregoing "Further Comments of Consumers Energy Company" to be hand-delivered to each of the following:

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